

STATE OF MICHIGAN
COURT OF APPEALS

GREAT AMERICAN ENVIRONMENTAL
SERVICE, INC.,

UNPUBLISHED
October 26, 2004

Plaintiff/Counter-Defendant-
Appellee,

v

MICHAEL C. HENRICKSEN and JUDITH C.
HENRICKSEN,

No. 251949
Dickinson Circuit Court
LC No. 00-011204-CK

Defendants/Counter-Plaintiffs-
Appellants.

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Appellants appeal as of right from the October 16, 2003, order denying appellants' renewed motion for summary disposition and change of venue and granting appellee's motion for summary disposition in appellants' counter-suit. This case stems from a dispute over a landfill-stock purchase agreement. We affirm in part, reverse in part and remand.

Appellants are the former sole shareholders of Wood Island Waste Management, Inc. (WIWM), which owned a landfill in Wetmore, Michigan. On June 17, 1993, appellants and appellee in this matter, entered into a stock purchase agreement (hereinafter "agreement"), whereby appellee would purchase all WIWM stock for cash payments and debt assumptions totaling \$394,811 and a series of royalty payments to appellants.

On or about November 18, 1998, appellants filed a complaint in the United States District Court, Western District of Michigan, case number 2:98-CV-215, alleging, inter alia, that appellee had breached the agreement. On February 10, 2000, a stipulated order to dismiss was entered into that provided appellants' claims relating to breach of the agreement would be dismissed without prejudice.

On February 11, 2000, appellee filed a complaint for declaratory relief in the Dickinson Circuit Court requesting that the court make determinations with respect to the parties' rights and obligations under the agreement. On April 30, 2000, appellants filed a motion for summary disposition. Appellants argued that appellee had improperly filed the declaratory judgment action while the federal suit was still pending in violation of MCR 2.116(C)(6), that appellee had

engaged in forum shopping, that appellee had not properly stated a cause of action for declaratory relief, and that venue was not proper in Dickinson County. The circuit court denied appellants' motion for summary disposition. On February 27, 2002, appellants filed a counter-complaint alleging that appellee charged its affiliated companies rates significantly lower than the market norm, that the rates charged to affiliated companies were significantly lower than rates charged to nonaffiliated companies, that appellee had engaged in the practice of deferring billings to affiliated companies, that appellee had not acted in the ordinary course of business in determining its rates or payment terms, that appellee had acted in bad faith, that appellee had breached sections 3.03(a) and 2.03(d) of the agreement, and requesting an accounting.

Additionally, appellants renewed their motion to dismiss the declaratory judgment action and change venue, and appellee filed a motion to dismiss appellants' counter-complaint. With respect to appellee's motion, the court held that the language of the agreement was unambiguous with respect to the meaning of "gross revenues" and that appellants had failed to raise any genuine issue of material fact with respect to their claims of breach of contract and breach of good faith, and request for accounting. The court again denied appellants' motion to renew.

Appellants first argue that the trial court improperly found that appellee had properly alleged a declaratory judgment action. We disagree. This Court reviews declaratory judgments de novo. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994). However, the trial court's findings of fact will not be reversed unless clearly erroneous. *Id.* MCR 2.605(A) provides in pertinent part as follows:

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

The condition precedent to filing a declaratory judgment action is that an actual controversy must exist. *Kuhn v East Detroit*, 50 Mich App 502, 504; 213 NW2d 599 (1973). Appellee has satisfied the requirements to bring the declaratory judgment action. The parties here are involved in a long-standing controversy over the interpretation of the stock purchase agreement, and the circuit court would have had jurisdiction over the same claim or claims if appellee had sought relief other than a declaratory judgment. MCR 2.605(A)(2).

Appellants urge this Court to focus on the fact that appellee had already allegedly breached the agreement, arguing that declaratory judgment actions are not proper in such cases. To the contrary, an actual injury or loss is generally a prerequisite to a court's jurisdiction to hear a declaratory judgment action. *Fieger v Comm'r of Ins*, 174 Mich App 467, 470; 437 NW2d 271 (1988). Thus, appellants' argument is without merit.

Appellants also argue that appellee engaged in forum shopping by filing the declaratory

judgment action in Dickinson Circuit Court. We disagree. Our Supreme Court has observed as follows with respect to forum shopping:

The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit. Presumably, plaintiffs will bring suit in the forum whose law is the most advantageous. In so doing, the plaintiff may be attempting to obtain a favorable result simply by choosing the right forum, raising the fear that “applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails).” [*Olmstead v Anderson*, 428 Mich 1, 26; 400 NW2d 292 (1987), quoting Morrison, *Death of conflicts*, 29 Vill L R 313, 362 (1983-84).].

In the instant case, there is no concern with forum shopping because the law of the forum state would be applied no matter which county in which the suit was filed. “There is no forum-shopping concern when the forum is also the plaintiff’s state of citizenship.” *Olmstead, supra* at 26. Therefore, appellants’ argument is without merit.

Appellants next argue that venue was not proper in Dickinson County. We disagree. Generally, this Court reviews for clear error a trial court’s ruling on a motion to change venue. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). “Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* “The proper venue for the contract cause of action would be determined by reference to [MCL 600.1621], which is the substantive venue provision applicable to contract actions.” *Massey, supra* at 389. MCL 600.1621 provides in pertinent part as follows: “(a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.”

The facts of the instant case are analogous to those in *Shock Bros, Inc v Morbark Industries, Inc*, 97 Mich App 616, 618-619; 296 NW2d 125 (1980). In finding that venue was proper in Macomb County in a suit against a farm equipment manufacturer with its principal place of business in Isabella County, this Court relied on the facts that the defendant’s agents had contacted the plaintiff in Macomb County, that the equipment was contracted for and delivered in Macomb County, that the defendant had sent service personnel there when the equipment malfunctioned, and that the defendant had sold other pieces of equipment in Macomb County. *Id.* at 619. The *Shock Bros* Court observed, “For venue purposes, then, it can be seen that all of defendant’s contacts with Macomb County seem to be in connection with the sale of its chiparvestors. Thus, the transaction defendant undertook with plaintiff was material and significant to the conduct of defendant’s business.” *Id.* at 619-620.

Though the record reveals that appellee approached appellants about the WIWM sale, the record otherwise reflects that appellants’ contacts with Dickinson County were in connection with the sale of WIWM and that the transaction appellants undertook with appellee was material and significant to the conduct of appellants’ business. Indeed, before the agreement, appellants only owned a landfill which was not even in operation. Pursuant to the agreement, appellee

constructed the landfill and maintained the properties. Without the transaction, there would have been no business for appellants to conduct. Therefore, the transaction was material and significant to the conduct of appellants' business, and the trial court did not clearly err by denying appellants' motion for a change of venue.

Next, appellants argue that the terms of § 2.03(d) of the agreement are ambiguous, thus creating a question of fact. We agree. Contract interpretation is an issue of law which an appellate court reviews de novo. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000).

The following language from the agreement is at issue:

In addition to the purchase price of Three Hundred Ninety-Four Thousand Eight Hundred and Eleven and 00/100 (\$394,811.00) Dollars, the Purchaser agrees to pay Seller Five (5) per cent of all gross revenues received based on all waste brought and dumped at the landfill site owned by WIWM and all adjacent sites. Gross revenue is defined as total sales or revenue less the required per-ton taxes assessed by State, Federal, and local governments. These royalty payments based on 5% of gross revenues, less the taxes set forth above, shall continue until the Purchaser, its successors and/or assigns cease to accept and dispose of waste at the landfill. Seller shall be provided reasonable access to Purchaser's books and records in order to conform the amounts of total sales or revenue and applicable taxes used to determine royalty payments.

"The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank, supra* at 63. "[I]f the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense." *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). A contract is ambiguous when it may reasonably be understood in different ways. *Id.* "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Id.* at 469. The *Klapp* Court further observed as follows:

"Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions." [*Id.*, quoting *O'Connor v March Automatic Irrigation Co*, 242 Mich 204, 210; 218 NW 784 (1928).]

The phrase "brought and dumped" is ambiguous in the context of the agreement because it is reasonably susceptible to at least two interpretations. See *Michigan Mut Ins Co, supra* at 87. As appellants argue, the word "brought" suggests that the gross revenues would be determined in part by the revenues earned from hauling the waste. If the revenues were to be earned solely

based on the waste dumped at the site, then the word “brought” would be rendered surplusage and nugatory. Therefore, appellant’s interpretation is a reasonable one. *Klapp, supra* at 468.

However, the language providing that the royalty payments will continue only until appellee ceases “to accept and dispose of waste at the landfill” appears to contemplate revenue only from waste actually disposed of at the landfill. Thus, the contract language in its entirety is ambiguous, and summary disposition was improper because factual development is necessary to resolve the issue. *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). Accordingly, we reverse and remand for further factual development on this issue.

Last, appellants argue that the trial court erred in granting summary disposition where the evidence established that a genuine issue of material facts existed with respect to: (1) whether appellee breached § 2.03(d) of the stock purchase agreement by failing to charge its customers a tipping fee of \$40 a ton, and (2) whether appellee breached the implied duty of good faith by setting lower tipping fees for its affiliated companies than for its nonaffiliated companies and by unreasonably delaying payment to WIWM from affiliated companies. We disagree.

A trial court’s decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Spiek v Michigan Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). “The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial.” *Id.* The facts must be viewed in the light most favorable to the nonmoving party. *Dressel, supra* at 561. “[W]hen such a motion is properly brought, the nonmovant must, under MCR 2.116(G)(3)(b) and 2.116(G)(4), produce admissible support for its opposition in order to defeat the motion.” *Adair v State*, 470 Mich 105, 120; 680 NW2d 386 (2004).

The agreement is silent with respect to the amount to be charged for tipping fees; thus, because the agreement is incomplete on its face, parol evidence showing the parties’ intent with respect to the amount of the tipping fees would be admissible, even though the agreement contains an integration clause. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998). Appellants allege that appellee’s president, Dave Brisson, represented that he would charge \$40 a ton as a tipping fee. However, the record indicates that Brisson never promised that the rates would be \$40 a ton. Further, the record indicates that appellants purposefully did not set a price in the hopes that tipping fees would increase, thereby garnering them more revenue under the five-percent royalty provision. Appellants rely on a pro forma submitted by Brisson to First National Bank of Iron Mountain before purchasing the landfill that estimated the tipping fees at approximately \$40 a ton. However, there is no indication in the record that appellants were aware of this pro forma, and even if they had been, it merely represents an estimate of what price would be charged and is not an actionable promise.

Further, the record discloses no documentary evidence presented by appellants that the tipping fees were set in bad faith or that there was any unreasonable delay in paying defendants. Mere allegations are insufficient to survive a motion for summary disposition under MCR 2.116(C)(10). *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502

NW2d 742 (1993). Therefore, summary disposition was proper under MCR 2.116(C)(10).

We find that the remainder of appellants' arguments are without merit. Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Jane E. Markey